

Action
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Office of Legislative Liaison

Routing Slip

TO:

	ACTION	INFO
1. D/OLL		X
2. DD/OLL Karen T.		X
3. Admin Officer		
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5. Legislation	X	
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7. DCh/Liaison		
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SUSPENSE

2 Apr 86
Date

Action Officer:

Remarks:

GI/ 18 Mar 86
Name/Date

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CONGRESSIONAL AFFAIRS
86-0784



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 18, 1986

LEGISLATIVE REFERRAL MEMORANDUM

SPECIAL

SPECIAL

TO: SEE ATTACHED DISTRIBUTION LIST

SUBJECT: House Government Operations Subcommittee draft bill to amend the Freedom of Information Act.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than APRIL 2, 1986.

(NOTE -- Staff of the House Government Operations Subcommittee on Government Information, Justice and Agriculture developed this draft in informal consultations with the Department of Justice. It is being circulated for review and comment to determine if it is a bill that the Administration could support.)

Direct your questions to Branden Blum (395-3454), the legislative attorney in this office.

[Signature]
James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: Fred Fielding Rob Veeder Frank Seidl
 John Cooney Karen Wilson John Lordan

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DRAFT

THE FREEDOM OF INFORMATION ACT

5 U.S.C. §552

As Proposed To Be Amended

§552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general

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policy or interpretations of general applicability
formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the fore-
going; and

(F) a complete list of all statutes that the agency
head or general counsel has determined authorize the agency
to withhold information under subsection (b)(3) of this
section, together with a specific description of the scope
of the information covered.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations

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which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on,

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used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person. Any requester who makes or maintains a request for records relating to the subject matter of any ongoing judicial action, administrative adjudication, or formal rulemaking proceeding, to which both the Government and the requester (or any person on whose behalf the requester acts) are parties, shall first give written notice of the request to counsel for the Government in the action, adjudication, or proceeding. An agency may reject a request for records on the basis of a failure by the requester to give such written notice.

(4) ~~{A}--In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform~~

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~~schedule-of-fees-applicable-to-all-constituent-units-of-such agency.--Such-fees-shall-be-limited-to-reasonable-standard charges-for-document-search-and-duplication-and-provide-for recovery-of-only-the-direct-costs-of-such-search-and-duplication. Documents-shall-be-furnished-without-charge-or-at-a-reduced charge-where-the-agency-determines-that-waiver-or-reduction-of the-fee-is-in-the-public-interest-because-furnishing-the-informa-tion-can-be-considered-as-primarily-benefiting-the-general public.~~ [Paragraph revised and relocated to subsection (a)(7)].

~~(B)~~ (A) On complaint filed by a requester within two years from the date of final agency action or by a submitter after a final decision to disclose submitted information but prior to its release, the district court of the United States in the district in which the complainant resides, or has its principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction --

(i) to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the ~~complainant~~ requester;

(ii) to enjoin the agency from disclosing records exempt from disclosure under subsection (b)(4); or

(iii) to enjoin the agency from failing to perform its duties under subsections (a)(1) and (2).

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(B) In an action--

(i) based on a complaint by a requester, the court shall have jurisdiction over any submitter of information contained in the requested records, and any such submitter may intervene as of right in the action;

(ii) based on a complaint by a submitter, the court shall have jurisdiction over any requester of records containing information which the submitter seeks to have withheld, and any such requester may intervene as of right in the action; and

(iii) in which a requester is an intervenor or is joined, the court shall, in ruling on a timely motion by the requester and subject to a contrary showing by the submitter, presume that the interests of justice are best served by transfer of the action to another district court preferred by the requester where the action might have been brought by the requester pursuant to subparagraph (A) of this paragraph, except that if the requester has a competing commercial interest with the submitter, venue shall be governed by section 1404 of title 28, United States Code.

(C) The agency that is the subject of the complaint shall promptly, upon service of a complaint--

(i) seeking the production of records containing information designated or treated as designated under paragraph (8) (A) (i) or (ii) of this subsection, notify each submitter of

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such information that the complaint was filed; and

(ii) seeking the withholding of records, notify each requester of the records that the complaint was filed.

(D) In such-a any case to enjoin the withholding or the disclosure of records, or the failure to comply with subsection (a) (1) or (2), the court shall determine the matter de novo-and. The court may examine the contents of such requested agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section-and-the. The burden is on the agency to sustain its action, except that the burden is on any submitter seeking the withholding of information.

~~(E)~~ (E) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

~~(D)--{Except-as-to-cases-the-court-considers-of-greater importance-proceedings-before-the-district-court-as-authorized by-this-subsection-and-appeals-therefrom-take-precedence-on-the~~

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~~docket-over-all-cases-and-shall-be-assigned-for-hearing-and-trial
or-for-argument-at-the-earliest-practicable-date-and-expedited-in
every-way.}~~--Repealed--Pub-L-98-620, Title IV, §402(2), Nov
8, 1984, 98-Stat-3335, 3357.

~~{E}~~ (F) (i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(ii) The court shall assess against a submitter reasonable attorney fees and other litigation costs reasonably incurred by a requester in any case under this section in which (I) the submitter is a party, (II) the requester has substantially prevailed, and (III) the court determines that the submitter's reasons for withholding of the record were [not substantially justified].

~~{F}~~ (G) (i) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that circumstances raise questions whether agency personnel acted arbitrarily or capriciously with respect to (I) the withholding, destruction, removal, or alteration of a record that was requested under this section, (II) an estimate or amount of a fee or the denial of a fee waiver or reduction, or (III) the denial of a request for expedited access, the Special Counsel

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shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible ~~for the withholding~~. ~~The Special Counsel, after~~ After investigation and consideration of the evidence submitted, the Special Counsel shall, within six months, submit his findings and recommendations to the head administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative, the court, the requester, the Committee on Government Operations of the House of Representatives, and the Committee on the Judiciary of the Senate. The administrative authority shall promptly take the corrective action that the Special Counsel recommends and file a report with each such Committee.

(ii) Whenever the court determines that agency personnel have acted arbitrarily or capriciously with respect to the processing of a request under this section, the court shall grant a waiver of all fees otherwise due under this section.

~~(6)~~ (H) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain

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and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall--

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used

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in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request--

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to

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complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(D) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, providing that upon receipt of a request for expedited access to records and upon demonstration by the requester of a compelling need for expedited access to records, the agency shall determine within five days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such a request for expedited access whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination. A requester whose request for expedited access has not been decided within five days of its receipt by the agency or has been denied shall not be required to exhaust administrative remedies. Whenever a request qualifying for expedited access requires an agency to provide notice to a submitter, the agency shall provide notice in the most expeditious manner practicable, and the time limits in paragraph

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(8) (A) (iii) and (8) (D) shall be reduced to five days after the submitter has received notice from the agency.

(E) Each agency shall include, as part of its regulations implementing this section, pursuant to notice and receipt of public comment, a description of the procedures used in the processing of requests under this section. If a separate queue or a special procedure is used in the processing of some categories of requests, the description shall identify the queue or procedure and shall specify the criteria used for differentiating between requests.

(7) (A) In order to carry out the provisions of this section, each agency shall (in accordance with the requirements of this paragraph) promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to ~~all-constituent-units-of-such-agency~~, the processing of requests under this section and establishing procedures and guidelines for determining when such fees should be waived or reduced. Such schedule shall conform to the guidelines which shall be promulgated, pursuant to notice and receipt of public comment, by the Director of the Office of Management and Budget and which shall provide for a uniform schedule of fees for all agencies.

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(B) Such-fees Fees for document search, review, and duplication shall be limited to reasonable standard charges for document-search-and-duplication and fee schedules shall provide for recovery of only the direct costs of such document search, review, and duplication. A person assessed a fee shall receive an itemized statement of such costs.

(C) (i) Except as provided in clause (ii) of this subparagraph, fees established by such regulations shall be limited to charges for document duplication where the agency determines that the request is made by--

(I) a person seeking document for use in academic, scholarly, or noncommercial scientific research;

(II) a representative of the news media, [including a publisher seeking documents for the purpose of information publication];

(III) a nonprofit organization that intends to make the information available to the news media, to any branch or agency of Federal, State, or local government, or to the general public;

(IV) an individual seeking records about himself or herself maintained in a system of records defined in section 552a of this title; or

(V) an individual seeking records (other than those described in clause (IV)) about himself or herself, if the

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individual demonstrates to the agency a reasonable basis for believing that there are records about himself or herself in the particular records sought to be searched.

(ii) For any request described in clause (i), an agency may not impose fees for document search unless the search consumes more than 10 hours and the agency has so notified the requester. Such notice shall inform the requester of the availability of and procedures for fee waiver or reduction under subparagraph (D) and of the charges for document search in excess of 10 hours.

(iii) Fees established by such regulations shall be limited to charges for document search and duplication where the agency determines that the request is for information which is unclassified, government-owned technical data and which is requested for use in bidding on government procurements.

(iv) For any request not described in clause (i), (ii), or (iii) of this subparagraph, fees established by such regulations shall be limited to charges for document search, review, and duplication.

(D) Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

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(E) Review costs shall include only the direct costs incurred during the initial examination of a document for the purposes of determining whether the documents must be disclosed under this section and for the purpose of withholding any portions exempt from disclosure under this section. For any request, no charge shall be made for review unless an agency is required to expend more than two hours in reviewing records responsive to the request. Review costs may not include any costs incurred in resolving issues of law and policy that may be raised in the course of processing a request under this section.

(F) No fee may be charged by any agency under this section if the costs of routine collection and processing of the fee are likely to equal or exceed the amount of the fee.

(G) No agency may require advance payment of any fee unless the requester has previously failed to pay fees in a timely fashion, or the agency has determined that the fee will exceed \$100.

(H) If an agency determines that --

(i) two or more requests have been made under this section within a 90-day period by one person, or by two or more persons acting in concert,

(ii) such requests seek to obtain records on the same or closely related subjects, and

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(iii) such requests have been separated primarily for the purpose of avoiding or reducing the payment of charges that would otherwise be applicable under this section,

the agency may treat the requests as a single request for the purpose of assessing such charges.

(8) (A) Each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying procedures by which--

(i) a submitter shall be required to designate, at the time it submits or provides to the agency or thereafter, any information that the submitter claims is exempt from disclosure under subsection (b) (4);

(ii) the agency may, if the agency determines that it is impractical for the submitter to designate a specific class of information as exempt from disclosure under subsection (b) (4), provide by rule that the specific class of information shall automatically be treated by the agency as if the information had been so designated by the submitter;

(iii) the agency shall notify the submitter that a request has been made for information designated as exempt by the submitter under clause (i) of this subparagraph or treated by the agency under clause (ii) of this subparagraph as if it had been designated, within five working days after the receipt of such

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request, and shall describe the request and advise the submitter of its right to submit written objections in response to the request;

(iv) the submitter may, within ten working days of the forwarding of such notification, submit to the agency written objection to such disclosure, specifying grounds upon which it is contended that the information should not be disclosed; and

(v) the agency shall determine, within ten working days of the date when the submitter's objections are due, whether to comply with the request and shall notify the submitter of any final decision regarding the release of such information.

(B) An agency is not required to notify a submitter pursuant to subparagraph (A) if--

(i) the information requested is not designated by the submitter as exempt from disclosure in accordance with agency regulations promulgated pursuant to subparagraph (A) (i), if such designation is required by the agency;

(ii) the agency determines, prior to giving such notice, that the request should be denied;

(iii) the disclosure is specifically required by a Federal statute (other than this section) or agency rule (issued under such a Federal statute other than this section); or

(iv) the information has been published or otherwise

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made public.

(C) Whenever an agency notifies a submitter of the receipt of a request pursuant to subparagraph (A), the agency shall at the same time notify the requester that the request is subject to the provisions of this paragraph and that notice of the request is being given to a submitter. Whenever an agency notifies a submitter of a final decision pursuant to subparagraph (A), the agency shall at the same time notify the requester of such final decision.

(D) Whenever a submitter has filed objections to disclosure of information pursuant to subparagraph (A)(iv), the agency shall not disclose any such information for ten working days after notice of the final decision to release the requested information has been forwarded to the submitter.

(E) The agency's disposition of the request and the submitter's objections shall be subject to judicial review pursuant to paragraph (4) of this subsection. No requester shall be required to exhaust administrative remedies if a complaint has been filed under this section by a submitter of information contained in the requested records, and no submitter of information contained in requested records shall be required to exhaust administrative

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remedies if a complaint has been filed under this section by the requester of such records.

(9) Each agency shall maintain for public inspection (A) a log of requests received, and (B) an index of all records disclosed pursuant to this section. This requirement shall not apply to requests by an individual for information about himself or herself.

(10) An agency may issue rules limiting, to one or more, the number of requests under this section that may be made in any one-year period by a convicted felon serving a term of incarceration.

(b) This section does not apply to matters that are--

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the

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public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) would constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source (including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis) and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful

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national security intelligence investigation, ~~confidential~~ information furnished ~~only~~ by the confidential source, (E) would disclose investigative techniques or procedures, or (F) could reasonably be expected to endanger the life or physical safety of law-enforcement-personnel any individual.

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions if disclosure would cause identifiable harm to the regulatory or supervisory process; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) (1) Whenever a request is made which involves access to records described in subsection (b) (7) (A) and--

(A) the investigation or proceeding involves a possible violation of criminal law; and

(B) there is reason to believe that (i) the subject of the investigation or proceeding is not aware of its pendency, and (ii) disclosure of the existence of the

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records could reasonably be expected to interfere with enforcement proceedings,
the agency may, during only such time as that circumstance continues, treat the records as not subject to the requirements of this section.

(2) Whenever informant records maintained by a criminal law enforcement agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier, the agency may treat the records as not subject to the requirements of this section unless the informant's status as an informant has been officially confirmed.

(3) Whenever a request is made which involves access to records maintained by the Federal Bureau of Investigation pertaining to foreign intelligence or counterintelligence [(as defined in Executive Order 12333)], or international terrorism [(as defined in the Foreign Intelligence Surveillance Act)], and the existence of the records is classified information as provided in subsection (b) (1), the Bureau may, as long as the existence of the records remains classified information, treat the records as not subject to the requirements of this section.

~~(e)~~ (d) This section does not authorize withholding of

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information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

~~{d}~~ (e) (1) On or before ~~March~~ December 1 of each calendar year, each agency shall, in accordance with standards promulgated by the Attorney General, submit a report covering the preceding calendar fiscal year to the Speaker of the House of Representatives and the President of the Senate for referral to the appropriate committees of the Congress. The report shall include--

~~{1}~~ (A) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

~~{2}~~ (B) the number of appeals made by persons under subsection (a) (6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

~~{3}~~ (C) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

~~{4}~~ (D) the results of each proceeding conducted pursuant to subsection ~~{a}{4}{F}~~ (a) (4) (G), including a

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report of the disciplinary action taken ~~against-the-officer~~
~~or-employee-who-was-primarily-responsible-for-improperly~~
withholding-records, or an explanation of why disciplinary
action was not taken;

~~(5)~~ (E) a copy of every change in any rule made by
such agency regarding this section;

(F) the number of requests received, processed, and
pending at the end of the year;

(G) the average length of time to comply with a
request and with an appeal;

(H) the number of requests for expedited access and
the number of requests for expedited access granted;

(I) the number of times that notices were sent to
submitters pursuant to paragraph (8) (A) (iii), and the number
of objections to disclosure filed by submitters following
receipt of notice;

~~(6)~~ (J) ~~a-copy-of-the-fee-schedule-and~~ the total
amount of fees collected by the agency for making records
available under this section;

(K) the number of fee waivers requested and the number
of fee waiver requests granted; and

~~(7)~~ (L) ~~such other information as-indicates-efforts-to~~
~~administrate-fully-this-section~~ required by the Attorney
General.

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(2) The Attorney General shall submit an annual report on or before ~~March~~ December 1 of each calendar year which shall include, for the prior calendar fiscal year, a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections ~~(a)(4)(E)~~, ~~(F)~~ (a)(4)(F) and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

[Notwithstanding the foregoing amendment, the reports required by section 552(e) of title 5, United States Code--

(1) shall be submitted on March 1, 1987, and shall cover the preceding calendar year; and

(2) shall be submitted on December 1, 1987, and shall cover the period from January 1, 1987, through September 30, 1987.]

~~(e)~~ (f) For purposes of this section --

(1) the ~~The~~ term 'agency' ~~as-defined-in-section-551(i)~~ ~~of-this-title~~ includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), ~~or~~ any independent regulatory agency and

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includes the Smithsonian Institution, the Council of Economic Advisors, and Administrative Office of the United States Courts.

(2) The term 'submitter' means any person who has submitted to an agency, or provided an agency access to, trade secrets, or commercial or financial information which is privileged or confidential.

SECTION-BY-SECTION SUMMARY
OF FOIA REFORM PROPOSAL

* | This FOIA reform proposal is a tentative draft prepared by the staff of the House Subcommittee on Government Information, Justice and Agriculture after consultation with the Department of Justice. It consists of four basic parts: business information procedures; law enforcement protections; fee and fee waiver provisions; and miscellaneous procedural requirements. For convenience, however, the proposal's provisions are summarized below on a section-by-section basis.

Section 1. Short Title: This section merely provides that the proposal is to be known as the "Freedom of Information Act Amendments of 1986."

Section 2. Reporting Use of Exemption 3 Statutes: This section would require each agency to publish a complete list of the statutes determined by the agency to qualify as independent nondisclosure laws authorizing the withholding of agency information under Exemption 3 of the FOIA.

Section 3. Use of FOIA for Discovery: This section is designed to provide notice to government counsel of FOIA requests made (or even maintained) by, or on behalf of, any party in litigation with the government, wherever the subject matter of the request is related to the subject matter of the ongoing litigation. An agency would be authorized to reject any FOIA request failing to give the notice required under this provision. This provision is based upon a recommendation of the Administrative Conference, although it does not include the suggested provision precluding the use of information in litigation.

Section 4. Judicial Review: This section would re-enact the existing judicial review provisions of the FOIA, found in subsection (a)(4) of the Act, together with several new judicial review provisions. Existing subsection (a)(4)(A) of the Act (which relates to fees and waivers) would be moved to new subsection (a)(7); note also that former subsection (a)(4)(D) of the Act (which provided for expedited court consideration of FOIA cases) was repealed in 1984. The following new judicial review provisions would be included:

-- Judicial review would be provided for "reverse" FOIA lawsuits, which would be adjudicated under a de novo review standard. See subparagraphs (A) through (D).

-- There would be a two-year statute of limitation for the bringing of FOIA lawsuits. See subparagraph (A).

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-- There would be specific jurisdiction, under a de novo review standard, over an agency's compliance with the "automatic publication" requirements of subsections (a)(1) and (a)(2) of the Act. See subparagraph (A).

-- There would be a specific venue provision permitting the requester his choice of forum as against any "reverse" FOIA plaintiff, except where the requester himself has a commercial interest in the matter. See subparagraph (B).

-- There would be a modified "sanctions" provision, one which would include additional types of agency misconduct as a basis for an MSPB investigation and which would also require a waiver of all fees due whenever a court directly determines that an agency has engaged in arbitrary or capricious conduct. See subparagraph (G).

Existing subparagraph (C) (pertaining to answers), and existing subparagraph (G) (pertaining to contempt of court) would be redesignated as paragraphs (E) and (H) without change.

Existing subparagraph (E) (regarding the award of attorneys fees) would be redesignated as subparagraph (F), and would be amended to add authority for awarding fees against a business submitter (instead of against the government) in a "reverse" FOIA case; the exact legal standard which would govern this new authority, however, has not yet been even tentatively agreed upon (and it therefore appears in brackets).

Section 5. Expedited Access: This section would specifically authorize FOIA requesters to seek expedited consideration of their FOIA requests, according to a "compelling need" standard, and would require agencies to determine whether to grant such special treatment within five working days after it is sought. A corresponding time adjustment to the "submitter notice" requirements of the proposal would be made wherever a request for expedited access to business information is granted.

Section 6. Processing Queues: This section would require agencies to promulgate regulations describing their processing procedures, specifically including any use of separate processing queues for certain categories of requests.

Section 7. Fees and Fee Waivers: This section would contain all FOIA provisions, both old and new, pertaining to fees and fee waivers. They are most conveniently set out in the following subparagraph form:

-- Subparagraph (A): This provision setting out the basic fee authority is quite similar to part of existing subparagraph (a)(4)(A) of the Act, except that it would require that agency fee regulations be promulgated uniformly in accordance with OMB fee guidelines.

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-- Subparagraph (B): This new provision would establish new agency authority to charge for the direct costs of document review, in addition to document search and duplication, and would entitle requesters to an itemized statement of all such charges.

-- Subparagraph (C): This new provision would divide all FOIA requesters into three general types, according to their individual characteristics as requesters, which would govern the types of fees that could be charged them. The first type of requester -- scholars, news media representatives, nonprofit organizations and (with a specific limitation) individuals seeking records about themselves -- would not be charged the new review fees, nor would they be charged any search fees for less than ten hours of search on a request. The second type of requester -- one who seeks unclassified, government-owned technical data for use in government contract bidding -- would not be charged new document review fees but would be charged search fees. All other requesters would be charged all fees -- subject, of course, to the Act's general fee waiver standard, which would be designated as subparagraph (D) but is identical to current law. (Note that the "information publisher" language of proposed subparagraph (C)(i)(II) is bracketed; there has been no agreement, even tentative, on such terms.)

-- Subparagraph (D): This language governing the waiver of fees in general is completely identical to the existing fee waiver language in subsection (a)(4)(A) of the Act. Thus, the Act's overall fee waiver standard would remain unchanged. This existing fee waiver standard would govern the charging of document duplication fees to all three categories of requesters in subparagraph (C), and the charging of search or review fees where otherwise applicable.

-- Subparagraph (E): This new provision would define the term "review costs" to include only the direct costs of processing records for release at the initial administrative level; it also provides that review fees cannot be charged unless they exceed two hours' worth of review time.

-- Subparagraph (F): This new provision would preclude the charging of any fee if the costs of processing a check for that fee are likely to equal or exceed its amount. Many agencies already follow such a policy.

-- Subparagraph (G): This new provision would preclude the requiring of advance fee payment except where a requester has failed to pay a fee in a timely fashion or where the fee is estimated to exceed \$100.

-- Subparagraph (H): This new provision would empower an agency to aggregate the requests of any requester (or a combination of requesters acting jointly) believed by the agency to be attempting to circumvent any of the proposal's minimum fee thresholds, within a 90-day period.

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Section 8. Business Information Procedures: This section would establish the procedures by which an agency would be required to notify the submitter of business information of a FOIA request for its information and to obtain and then adjudicate any submitter objections to disclosure. No such notice would be required where the agency determines at the outset that disclosure is required by law (other than the FOIA), that the information is already in the public domain or, on the other hand, that the FOIA request should be denied. Business submitters could be required by agencies to designate, at the time of submission, which of their submitted records is claimed to be entitled to the FOIA's substantive and procedural protections. A FOIA requester would be entitled to written notice of the implementation of these procedures. Both the filing of a submitter's objections and the agency's adjudication would be subject to ten-working-day deadlines.

Section 9. Recordkeeping Requirements: This section would require agencies to maintain both a log of FOIA requests received and an index of all records released, except with respect to requests by individuals for records about themselves.

Section 10. Incarcerated Felons: This section would give agencies the authority to limit use of the FOIA by incarcerated felons to one or more requests per year.

Section 11. Investigatory Records: This section would make the following language changes in three of the subparts of Exemption 7:

-- In Exemptions 7(A), 7(D) and 7(F), the Act's existing harm standard would be modified by the phrase "could reasonably be expected to."

-- In Exemption 7(D), the limiting words "confidential" and "only" would be deleted from the second clause of the exemption so that it would expressly encompass all "information furnished by the confidential source."

-- Exemption 7(D) also would be amended to expressly include "institutional" sources such as local and foreign law enforcement agencies and private enterprises within the meaning of the term "confidential source."

-- Finally, Exemption 7(F) would be expanded to protect the life or physical safety of "any individual."

Section 12. Financial Institution Records: This section would add a relatively slight "harm" standard to Exemption 8 by inserting at the end of it the language, "if disclosure would cause identifiable harm to the regulatory or supervisory process."

Section 13. Law Enforcement Record Exclusion: This section would give criminal law enforcement agencies the explicit

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authority, under three specific sets of circumstances, to exclude records from the coverage of the FOIA by treating them as "not subject to the requirements" of the Act. This novel FOIA authority could be exercised under the following conditions:

-- Whenever a criminal law enforcement agency determines that the records sought would be withholdable under Exemption 7(A) and that disclosure even of the existence of such records, in the context of the request and all surrounding circumstances, could reasonably be expected to "tip off" the investigation's target about whether there is an ongoing criminal investigation against him. This exclusion would be temporal in nature: It would no longer be applicable after the target of the investigation is reasonably determined to know of the ongoing proceeding or where disclosure would not otherwise be expected to harm an ongoing matter. On the other hand, even if the agency in fact had no ongoing investigation, any potential target attempting to use the FOIA to determine the existence of an investigation would be unable to do so.

-- Whenever a criminal law enforcement agency receives a specific request for the records maintained on a named individual in its informant files (where disclosure even of the existence of records would confirm his status as an informant), so long as the individual's status as an informant has never been officially confirmed.

-- Whenever the FBI receives a request for records of a foreign intelligence, counterintelligence, or terrorism investigation, if the very existence of the records is itself a classified fact.

Section 14. Annual Reporting Requirements: This section would shift annual agency FOIA reports to a calendar year cycle and would require additional items of information in the reports for oversight purposes.

Section 15. Definitions: This section contains a tentative attempt by the subcommittee to subject three agencies to the FOIA for the first time: the Smithsonian Institution, the Council of Economic Advisors and the Administrative Office of the United States Courts. The Department has not yet agreed to include these agencies. It also provides a definition of business "submitter."